

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KRZYSZTOF F. WOLINSKI,
Petitioner,
v.
GINA JONES, et al.,
Respondents.

No. 2:23-cv-0383 DAD DB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and a motion to proceed in forma pauperis. Petitioner claims he is being denied Halal meals in violation of his First Amendment rights. On screening, this court found petitioner's claim may not be raised in a §2254 petition and recommended the petition be dismissed without prejudice to its renewal as a civil rights action under 42 U.S.C. §1983. In addition, this court dismissed petitioner's motion to proceed in forma pauperis as moot. (Mar. 21, 2023 Order and Findings and Recos. (ECF No. 6).)

Petitioner filed objections to the findings and recommendations. Petitioner states that he wishes to convert this action to a civil rights action. Petitioner appears to recognize the differences between a habeas proceeding and a civil rights proceeding. Therefore, this court will vacate the recommendation that this case be dismissed and reinstate petitioner's motion to proceed in forma pauperis.

1 In the findings and recommendations, this court noted that petitioner has been designated
2 a “three strikes” litigant under 28 U.S.C. §1915(g). A prisoner incurs three strikes when they
3 have filed three or more suits which were dismissed as frivolous, as malicious, or for the
4 prisoner’s failure to state a claim upon which relief may be granted. 28 U.S.C. §1915(g).
5 Recently, a judge in this district found petitioner had incurred three strikes, denied his motion to
6 proceed in forma pauperis, and dismissed the case for petitioner’s failure to pay the filing fee.
7 Wolinski v. Allison, No. 2:22-cv-0451 KJM EFB P (Orders filed July 15, 2022 and January 17,
8 2023).

9 As a three-strikes litigant, petitioner may only proceed in a §1983 action if he
10 demonstrates that at the time he filed suit, he was “under imminent danger of serious physical
11 injury.” 28 U.S.C. § 1915(g). Petitioner’s claim – that he was denied Halal meals in violation of
12 his First Amendment rights – does not show any such imminent danger. Therefore, this court will
13 recommend that petitioner’s motion to proceed in forma pauperis be denied and he be required to
14 pay the \$402 filing fee if he wishes to proceed with this action.¹

15 Accordingly, IT IS HEREBY ORDERED that

16 1. The March 21, 2023, Order and Findings and Recommendations (ECF No. 6) are
17 vacated;

18 2. Petitioner’s motion to proceed in forma pauperis (ECF No. 2) is reinstated; and

19 3. The Clerk of the Court shall re-categorize this case as a civil rights action under 42
20 U.S.C. §1983.

21 Further, IT IS RECOMMENDED that

22 1. Petitioner’s motion to proceed in forma pauperis be denied because he has incurred at
23 least three strikes under 28 U.S.C. §1915(g); and

24 2. Petitioner be ordered to pay the \$402 filing fee if he wishes to proceed with this case as
25 a civil rights action under 42 U.S.C. §1983.

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¹ If, and when, petitioner is permitted to proceed with this case as a civil rights case, petitioner
28 will be required to file a complaint on the form for prisoner civil rights cases used by this district.

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, petitioner may file written objections with the court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Petitioner is advised that failure to file objections within the specified time may result in waiver of the right to appeal the district court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

8 || DATED: April 19, 2023

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/s/ DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

DLB:9
DB prisoner inbox/habeas/S/woli0383.conv to 1983.3 strikes